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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 300

WILBUR L. HUNT, PETITIONER

v.

THE UNITED STATES OF AMERICA

No. 301

GLENN HENDERSON, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 269–271) is reported in 120 F. (2d) 592.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered May 21, 1941 (R. 272). Petition for rehearing was denied June 23, 1941 (R. 298).

Petition for certiorari was filed July 23, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925. See also Rule XI of the Rules of Practice and Procedure in Criminal Cases promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether alleged insufficiency of two counts of a six-count indictment presents a proper question for review where a general sentence is imposed which does not exceed that which might properly have been imposed on any one of the four remaining counts.

2. Whether the trial court erred in refusing to compel the Government to elect upon which of the six counts petitioners would be tried.

3. Whether petitioners were improperly denied separate trials.

4. Whether the cross-examination of one of the Government's witnesses was unduly restricted.

5. Whether the trial court erred in admitting evidence alleged to have been in anticipation of the defense and in admitting testimony relative to an incriminating statement made by one of the accused.

6. Whether there was a fatal variance between the indictment and proof.

7. Whether the trial court erred in its instructions to the jury.

8. Whether it was prejudicial for the prosecutor to refer to one of petitioners as a "talent scout" for the other.

9. Whether the evidence is sufficient to support the verdict.

STATUTE INVOLVED

The full text of section 2 of the White Slave Traffic Act of June 25, 1910, 36 Stat. 825, 18 U. S. C. § 398, is set forth in the Appendix, *infra*, p. 13.

STATEMENT

Petitioners were convicted (R. 181) and sentenced (R. 227) in the United States District Court for the Northern District of Illinois on all six counts of an indictment (R. 3–5) charging violations of the White Slave Traffic Act. The first three counts (R. 3–4) charged the petitioners with transporting and causing to be transported in interstate commerce two girls, Viona Barker and Juanita Marquis, from Benton Harbor, Michigan, to Chicago, Illinois, for the purposes set forth in the Act; and the last three counts (R. 4, 5) charged both men with the same offenses in connection with the transportation of Juanita Marquis from Chicago, Illinois, to Milwaukee, Wisconsin. Each petitioner was sentenced generally to imprisonment for five years (R. 227).

The Government's case may be summarized as follows:

Petitioners are lingerie and shirt salesmen, selling at least in part to prostitutes (R. 92, 121, 133–

134). In August 1939, at Benton Harbor, Michigan, petitioner, Hunt, told Viona and Juanita that he could get work for them in a house of prostitution through a man he knew in Chicago (R. 25, 26, 27, 50). He then communicated with petitioner, Henderson, who came immediately and drove the girls to Chicago (R. 27, 50, 51). On the way to Chicago he told them he would find them a place in a house of prostitution "as soon as possible" (R. 28) and that he would furnish them with clothes (R. 27, 52). He also told them that if they ran afoul of the law they were to say that they were 22 years old and from Southern Illinois (R. 27–28, 52). The girls were each 19 years old at the time (R. 28, 63).

Hunt rejoined the group in Chicago later that day (R. 29, 43, 45, 52, 68), and petitioners went to Aurora, Illinois, to see Mabel Wright, the owner of a house of prostitution known as the LaSalle Hotel, and made arrangements for the employment of Viona (R. 87). The next morning petitioners bought clothes for the girls (R. 29, 45, 47, 52, 53, 69). The following day, they brought the clothes to the girls at their hotel (R. 29, 52, 53, 69) and drove both of them to Aurora (R. 53). On the way, Viona was told that she was being taken to a "nice place" which she would like, and where she would be treated well and given instructions (R. 31). She was directed to save all her money and told that Henderson would visit her weekly (R. 31). Viona remained at the LaSalle Hotel as a prostitute; she

gave part, at least, of her earnings to Henderson (R. 32, 33).

Petitioners meanwhile drove Juanita to Milwaukee (R. 54, 70); petitioners told her that she was being taken to a house of prostitution where she would be treated well and would earn "lots of money" (R. 54). Hunt did not "come right out" and tell Juanita to give him any money but "he said I was to save my money" (R. 54). Petitioners brought her to the Linn Tavern, where she remained for several days working as a prostitute until she went to a hotel in Milwaukee (R. 55, 84). Henderson thereafter telephoned Juanita to tell her that Hunt was angry because he could not find her (R. 56).

The next morning Henderson called for Juanita and took her to a house of prostitution in Sheboygan, Wisconsin, where he had made previous arrangements for her reception (R. 56). He asked her for her money, and she gave him $14 (R. 56). Juanita worked as a prostitute in Sheboygan, and from time to time turned over the money she earned to Henderson (R. 57). Some days later, Henderson brought Juanita back to Chicago and then to Aurora, where he had arranged with Mabel Wright to take Juanita in at the LaSalle Hotel (R. 57, 58, 87). Juanita again worked as a prostitute, and turned her earnings over to Henderson (R. 59).

About a week later Henderson agreed to drive the two girls to Chicago so that they could take a train

and go home (R. 33). En route to Chicago, they stopped at a roadhouse, where they were joined by one Buck and another man (R. 60). Henderson took $35 from Juanita's purse (R. 60), against her objections, saying "I will keep it for you" (R. 34). It was there arranged that Henderson and Juanita would drive ahead into Chicago, and Buck and his friend would follow them with Viona (R. 60). Viona was taken by a short cut to the north side of Chicago, and one of the two men wanted to take her to a hotel, but she refused and broke away from him (R. 35). She went to Henderson's room to get her clothes and find Juanita (R. 35). Juanita meanwhile had been driven to a hotel in Chicago by Henderson, but when he did not return, she left to look for Viona (R. 60). By that time, Viona had summoned the police (R. 35). As the police arrived, Juanita came around the corner alone, and the girls were taken to a police station (R. 36).

At the police station the girls identified Henderson and Hunt as the men who had transported them (R. 36, 61). Thomas F. Mullen, an agent of the Federal Bureau of Investigation, interviewed both men. Henderson remained silent. Hunt, however, said the girls had approached him in Benton Harbor about finding a place in a house of prostitution and that he had called Henderson; that he had driven from Chicago to Aurora with Henderson and the two girls; but that the trip from Chicago to Milwaukee was made by himself and Henderson alone.

When Mullen asked him if he wanted to give or make a signed statement, Hunt said "No, I am in just as deep as Henderson" (R. 90–92).

Thereafter a preliminary hearing was held before the United States Commissioner. While Juanita was testifying, the petitioner, Hunt, was facing her at the counsel table and kept looking at her "real hard," at the same time shaking his head negatively with his finger up to his mouth (R. 79, 80, 82). At the trial, Viona and Juanita, as well as the women who conducted the business of prostitution at the LaSalle Hotel and the Linn Tavern, testified for the Government. Henderson testified but Hunt did not. The jury returned a verdict of guilty on all counts in the indictment (R. 181).

ARGUMENT

1. Relying upon *King* v. *United States,* 55 F. (2d) 1058 (C. C. A. 10), petitioners argue (Pet. 37–38) that counts 2 and 5 of the indictment charging transportation of the girls for the purpose of giving themselves up to debauchery and of engaging in other immoral practices (R. 3) are vague and indefinite. The court below held (R. 271) that since the offense is charged in the language of the statute it is legally sufficient, citing *United States* v. *Lewis,* 110 F. (2d) 460, 462, 463 (C. C. A. 7), certiorari denied, 310 U. S. 634. Even apart from the legal sufficiency of these counts, no question is presented for review in this Court since the general sentence imposed (R. 226–227) "did not exceed that

which might properly have been imposed upon conviction under any single count." *Claasen* v. *United States,* 142 U. S. 140; *Evans* v. *United States,* 153 U. S. 584, 608; *Abrams* v. *United States,* 250 U. S. 616, 619.

2. Petitioners contend that the trial court was guilty of a "gross abuse" of discretion in refusing to require the Government to elect to prosecute them upon a single count (Pet. 17–19). But as the court below held (R. 270), the case plainly falls within the statute permitting joinder of offenses. Act of February 26, 1853, sec. 7, 10 Stat. 161, 162, 18 U. S. C. sec. 557.[1]

3. It is plain that no prejudice resulted from the trial court's refusal to grant petitioners separate trials. *Lucas* v. *United States,* 104 F. (2d) 225, 226 (App. D. C.). As the court below pointed out (R. 270), "they acted jointly in most of the transactions which went to make up the crime charged" and, even though the evidence in part showed acts and declarations of petitioners outside of each other's presence, the jury was repeatedly advised concerning the proper consideration to be given

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[1] Since the separate offenses charged were of the same class and were closely related as parts of a continuing enterprise, it cannot properly be said that the failure to require an election tended "to confound the accused or distract the attention of the jury" (Pet. 18). The trial judge did not, therefore, abuse his discretion in refusing to require an election. *Foster* v. *United States,* 256 Fed. 207, 209 (C. C. A. 5); *Moore* v. *United States,* 288 Fed. 249, 250 (App. D. C.).

such testimony (R. 24, 26, 27, 29, 33, 50, 51, 176, 177).[2]

4. Petitoners contend (Pet. 19–22) that the trial court unduly limited the cross-examination of Viona Barker relative to (1) whether she had ever been to Chicago before; (2) her age; (3) her willingness to go to Chicago; (4) her prior use of an assumed name; (5) whether she despised Henderson; and (6) whether Hunt induced her to engage in prostitution. As the circuit court of appeals held (R. 271), petitioners "were in no way prejudiced by such complained of limitation of cross-examination."

Viona admitted that she had previously been in Chicago (R. 45). The attempt to impeach her testimony by showing prior contradictory statements concerning her age and her willingness to go to Chicago was improper both because of the form of the questions and because counsel was attempting to impeach her by reference to his own notes of her testimony at the Commissioner's hearing, rather than by an accurate transcript (R. 40–42). Whether she had previously used the same pseudonym that she used in Chicago could have but little bearing upon her credibility. The inquiry concern-

[2] There was no essential difference between the respective defenses offered. Henderson testified, denying that the transportations were with the intent and purpose charged in the indictment, and Hunt did not testify at all. The only defense was that the incriminating testimony of the Government's witnesses was incredible.

ing the time when she stated that she despised Henderson (R. 38) was unnecessary to show the extent of her bias, since she freely admitted her hatred of Henderson (R. 46). Finally, whether Hunt had induced her to give herself up to debauchery and engage in other immoral practices (R. 44) was for the jury to determine upon all the evidence presented and not for Viona to answer.

5. The testimony regarding the gestured threats which petitioner Hunt directed toward Juanita at the Commissioner's hearing (R. 80–82) was not introduced in anticipation of petitioners' defense, as is contended (Pet. 27), but it was admissible as a circumstance tending to prove Hunt's guilt since it showed an attempt by him to supress or influence her testimony. *United States* v. *Freundich*, 95 F. (2d) 376, 379 (C. C. A. 2); *Hass* v. *United States*, 31 F. (2d) 13, 14, 15 (C. C. A. 9), certiorari denied, 279 U. S. 865. Nor was there error in admitting testimony concerning Hunt's statement that he was "in just as deep as Henderson" (R. 94), since the statement was freely and voluntarily made.[3]

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[3] The fact that he was in custody at the time would not, as petitioners urge (Pet. 33), of itself render it inadmissible. *Sparf and Hansen v. United States*, 156 U. S. 51, 55; *Pierce* v. *United States*, 160 U. S. 355, 357; *Bram* v. *United States*, 168 U. S. 532, 558; *Perovich* v. *United States*, 205 U. S. 86, 91; *Bilokumsky* v. *Tod*, 263 U. S. 149, 157; *Wan* v. *United States*, 266 U. S. 1, 14. Nor was it necessary (Pet. 32) that he be warned that anything he might say could be used against him. *Wilson* v. *United States*, 162 U. S. 613, 623; *Powers* v. *United States*, 223 U. S. 303, 313, 314.

6. Petitioners assign error (Pet. 14, 37) upon the ground that there was a fatal variance between the indictment and proof. The court below properly held (R. 271) that there was no variance. As the court below further pointed out, the charge to the jury made clear precisely what transactions constituted the offenses for which petitioners were being tried and that evidence of other transactions should only be considered as bearing upon petitioners' original intent and purpose (R. 175).[4]

7. Finally, it is plain that petitioners' contention that "the evidence is utterly insufficient" (Pet. 15) is entirely without merit.[5] That the girls were transported and thereafter, with petitioners' aid,

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[4] Petitioners' contention (Pet. 22–25) that the trial court erred in failing to give "the usual accomplice instructions" and their proffered instruction regarding credibility (R. 111–112, 180), is wholly without merit since plainly none of the Government's witnesses were accomplices and the charge given (R. 178) adequately covered the question of the witnesses' credibility. Nor was it error to refuse petitioners' requested instruction defining "debauchery" (Pet. 25–26), for it was based upon the erroneous assumption that the statute required "seduction from virtue" (R. 112). The definition given by the trial court (R. 176) was clearly correct, for it is settled that "whether the woman be pure or impure, if her transportation be for the purpose of sexual immorality, the statute is violated." *Suslak* v. *United States*, 213 Fed. 913, 917 (C. C. A. 9).

[5] Petitioners also complain of the prosecutor's statement in his summation that the jury had a right to ask themselves whether Hunt was a "talent scout" for Henderson (R. 145). If anything, it dignified his activities and added little to the web of guilt in which he was enmeshed. Cf. *United States* v. *Goodman*, 110 F. (2d) 390, 395 (C. C. A. 7).

obtained work in houses of prostitution is clearly shown. It is a fair inference from all the evidence that the transportations were with the intention and purpose of inducing and enticing, if not compelling, the girls to prostitute themselves. The credibility of the Government's witnesses was for the jury to determine and, since the courts below have found the evidence sufficient, no reason appears why this Court should review it again. *Delaney* v. *United States,* 263 U. S. 586, 589–590.

CONCLUSION

Petitioners had a fair trial and the verdict of the jury is supported by the evidence. No question of importance is presented, and there is no conflict of decisions. We therefore respectfully submit that the petition for writ of certiorari should be denied.

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AUGUST 1941.